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THE GOVERNMENT OF BENGAL v. UMESH CHUNDER MITTER.

satisfied that the Magistrate had no reasonable ground for acquitting the prisoners.

Assuming that the reasons which actuated the Magistrate in discharging the prisoners coincide with the arguments which have been addressed to us by Counsel for the respondents, we think that the Magistrate had no reasonable ground for acquitting the prisoners, and that the crime was fully proved. We convict the accused Umesh Chunder Mitter under ss. 420 and 511, Indian Penal Code, and convict Hem Chunder Chatterjee of abetting the offence committed by Umesh Chunder Mitter.

As to sentence, we think that, considering all the circumstances of the case, and especially the good character which the accused have heretofore borne, the ends of justice will be satisfied by the infliction of a fine. We sentence each of the accused to pay a fine of Rs. 200; in default to suffer simple imprisonment for the period of two months.

C. D. P. *Order of acquittal set aside.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

ABDUL WAHED AND OTHERS (DECREE-HOLDERS) *v.* FAREEDOONNISSA (JUDGMENT-DEBTOR).*

1889 *March* 1.

Execution of decree—Security for Costs—Security Bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), *s.* 549—*Act VII of* 1888, *s.* 46—*General Clauses Act (I of* 1868), *s.* 6.

On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force: *Held*, on appeal, that the application should have been allowed.

* Appeal from Order No. 468 of 1888, against the order of Baboo Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 24th of November 1888.

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ONE Fareedoonnissa Bibee became surety for the costs of a certain person who was an appellant in an appeal pending in the High Court against Abdul Wahed and others at a time previous to the passing of Act VII of 1888. This appeal was dismissed with costs, and Abdul Wahed and his co-respondents in that appeal thereupon sought to recover such costs from Fareedoonnissa, and with that object, on the 9th June 1888, applied for execution of their decree against Fareedoonnissa. This application was dismissed, on the ground that, as the law then stood, the decree-holder's only remedy was to bring a regular suit upon the security bond. On the 1st July 1888, subsequently to this order, which was not appealed against, Act VII of 1888 came into force; and the decree-holders on the 28th July made a fresh application under s. 46 of that Act (which added additional matter to s. 549 of the Civil Procedure Code of 1888) for execution of their decree against Fareedoonnissa. The same Sub-Judge who had dismissed the former application refused to allow the second application, on the ground that Act VII of 1888 did not affect the case, section 6 of the General Clauses Act of 1868 being sufficient to save all proceedings commenced before the amending Act came into operation.

The decree-holders appealed to the High Court.

Moulvi *Mahomed Yusuf* and Baboo *Saligram Singh* for the appellants.

Mr. *R. E. Twidale* for the respondent.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

The question in this appeal is purely one of law, and that law relates, we think, simply to procedure.

We think that the Court below has made a mistake in dealing with that question. The appellants before us were in a former suit respondents in this Court in an appeal from an original decree. In that appeal the appellant was required by this Court to furnish security for costs. The present respondent became surety. That appeal was ultimately dismissed with costs; and the respondents, who are now before us as appellants, seek to recover their costs from the surety. They applied to the lower Court for

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suit. The new provision of Act VII of 1888 is one of procedure, and not one which deals with any right. The right of the decree-holders to recover their money is not affected, nor is the liability of the surety to pay the money. The only alteration is as to the mode in which to recover.

We think, therefore, that the judgment-creditors were entitled to bring this fresh application under the new Act, and the Court below ought to have granted it. That being so, we decree this appeal with costs.

T. A. P. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1889 *January* 24.

BHABA NATH ROY CHOWDHRY AND OTHERS (PLAINTIFFS) *v.* DURGA PROSUNNO GHOSE AND OTHERS (DEFENDANTS).°

Co-sharer—Fractional shareholders in joint undivided estate—Lien on tenure for share of rent—Sale of tenure in satisfaction of decree.

The owner of a fractional share in a joint undivided estate has no lien on the tenure itself for his share of the rent, although such share is collected separately, and, therefore, cannot cause the tenure to be sold in satisfaction of a decree for his share of the rent.

SUIT by fractional shareholders in an undivided zemindari for the sale of a tenure for arrears of rent.

The plaintiffs Prosunno Chunder Roy Chowdhry and six others were the owners of fractional shares in the mouzahs Shibpur and Hosnabad, in the district of the 24-Pergunnahs. Defendants Nos. 2, 3 and 4 had a jama in these mouzahs for which they paid rent to the plaintiffs and their co-sharers. The plaintiffs' share of the rents was paid to them separately. In 1884 the plaintiffs obtained a decree for rent of 1286-1288 (1879-1881) in respect of this jama against defendants Nos. 2, 3 and 4. In execution of this decree the jama was attached, and the 3rd March 1884 was fixed for the sale. Durga Prosunno Ghose, defendant No. 1, thereupon preferred a claim,

° Appeal from Appellate Decree, No. 2337 of 1887, against the decree of H. Beveridge, Esq., Judge of the 24-Pergunnahs, dated the 30th of June 1887, affirming the decree of Baboo Binode Behari Mittra, Munsiff of Bashirhat, dated the 13th September 1886.

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execution of the decree for costs against the surety. On the 9th June last the lower Court rejected their application, holding that, under the law as then laid down by the Civil Procedure Code, the security bond could not be enforced by means of execution of the decree, and that the judgment-creditors must have recourse to a fresh suit against the surety. The judgment-creditors did not appeal against that decision, nor have they brought a fresh suit to recover the amount of the security. In the meantime, on the 1st July 1888, Act VII of 1888 came into force. By s. 46 of that Act, s. 549 of the Code received the following addition: "If such security be furnished, any costs for which a surety may have rendered himself liable may be recovered from him in execution of the decree of the Appellate Court in the same manner as if he were the appellant." The judgment-creditors, taking advantage of this provision of the new Act, made a fresh application on the 28th July for execution against the surety. On the 24th November last this application was likewise rejected by the lower Court. The lower Court referred to s. 6 of the General Clauses Act which enacts: "The repeal of any Statute, Act or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or any proceedings commenced, before the repealing Act shall have come into operation." And the Subordinate Judge goes on to say that "the question whether the decree-holders can enforce the security bond was raised and decided before the amending Act came into operation, and the proceedings against the surety had been commenced before that time."

It seems to us that the lower Court was mistaken in its application of this section of the General Clauses Act. By Act VII of 1888 the previous Statute was not repealed, and we think that the decision of the lower Court of the 9th June decided no more than that the existing law did not permit the decree-holders to recover from the surety in execution of the decree. The amending Act, which came into force a few days afterwards, expressly provides for such recovery from the surety in execution. The lower Court did not, on the 9th June, decide any question of right between the parties. It merely decided that, by the law as it stood then, the decree-holders must have recourse to a separate

alleging that he had purchased the jama at an auction sale, and that he was in possession. His claim was allowed and the property released from attachment on the 14th June 1884.

The plaintiffs thereupon brought this suit for a declaration that the jama was liable for the amount of their decree and that it should be sold in satisfaction of the same.

The plaintiffs alleged that the rent payable to them in respect of the jama had been separately settled with defendants Nos. 2, 3 and 4; that the defendant No. 1 did not purchase the jama; that the jama was not transferable; and that, therefore, even if defendant No. 1 had purchased it, the purchase was invalid; and that, supposing the sale to defendant No. 1 was valid, the jama was liable for the amount of the plaintiffs' decree.

The defendant No. 1 alleged that the jama was a mourasi mokurari ganti, bearing a rental of about Rs. 298, of which the plaintiffs were entitled to Rs. 25-8 a year; that he had purchased the jama at an auction sale on the 6th March 1883, and obtained his sale certificate on the 26th July 1883; and that he was put into possession on the 26th February 1884. He also alleged that the arrears, if any, fell due before he had acquired a right in the property. He contended, *inter alia*, that the plaintiffs, as owners of fractional shares in an undivided zemindari, could not sell the tenure itself in execution of their decree for rent.

The other defendants did not appear.

The Munsiff found that defendant No. 1 had purchased the jama at an auction sale on the 6th March 1883, and that he had been put into possession; that the jama was a mokurari or kayemi jama, and, therefore, transferable by sale. He held that the sale to defendant No. 1 was valid, and that the plaintiffs had failed to prove that defendants Nos. 2, 3 and 4 held the jama under them under a distinct and separate settlement; and that the land of the jama was the *ijmali* land of all the proprietors, although the rent was paid separately to each proprietor or sets of proprietors.

He further held that, in accordance with the provisions of s. 64 of Bengal Act VIII of 1869 and, upon the authority of the case of *Grish Chunder Mitter* v. *Sheik Jakhu* (1) and that

(1) 17 W. R., 352; 12 B. L. R., 488, *note*.

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of *Nund Lall Roy* v. *Gooroo Churn Bose* (1), the plaintiffs, as co-sharers in a joint undivided estate, could not cause the tenure itself to be sold in execution of a decree for the share of the rent, but could only sell the right, title and interest of the judgment-debtors under the Code of Civil Procedure; and that, consequently, they could not follow the tenure in the hands of defendant No. 1, in satisfaction of their decree. The Munsiff accordingly dismissed the suit.

The plaintiffs appealed to the District Judge of the 24-Pergunnahs, who upheld the judgment of the Munsiff and dismissed the appeal with costs.

The plaintiffs, with the exception of Prosunno Chunder Roy Chowdhry, preferred a second appeal to the High Court.

Mr. *Woodroffe* and Baboo *Jogesh Chunder Roy* for the appellants.

Mr. *Evans*, Baboo *Jogendra Nath Bose* and Baboo *Kali Charan Banerjee* for the respondents.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was as follows:—

This was a suit to have it declared that a certain tenure was liable to be sold in execution of a decree for arrears of rent, the decree having been obtained against the former owner of the tenure.

It appears that before the decree was passed, the appellant's right and interest had been sold in execution of a money decree, and purchased by the principal defendant in the present suit. The landlord was only a co-sharer. He applied for the sale of the tenure under the provisions s. 64, Bengal Act VIII of 1869, and the procedure governing that application was that laid down in the Code of Civil Procedure. A claim was put in by the purchaser of the tenants' right and interest, who was not registered as transferee in the zemindar's sherishta, under s. 278; and that claim was allowed, and the attachment was withdrawn.

The present suit was brought to establish the decree-holder's right to sell the property in the hands of the alienee. Both the Courts below dismissed the suit. This second appeal was preferred by the plaintiff, and it has been argued on his behalf that the landlord, although only a co-sharer to a certain extent,

(1) 15 W. R., 6.

was entitled to sell the tenure in whosesoever hands it might be, because his rent suit was brought and a decree obtained against the recorded tenant.

It appears to us that the appellant was entitled to alienate his tenure, unless and until it was attached in execution. The case was governed by the ordinary Procedure Code, and, in that Code, there is no bar to alienation of property by the judgment-debtor, so long as that property has not been attached; unless, of course, it was shown that the alienation was intended to defraud creditors. But there is nothing in the procedure, and there is nothing in the decree obtained by the plaintiff giving him any lien upon the land in question, and we are not aware of any statutory lien existing in favour of the plaintiff as a co-sharer. The decree was obtained in May 1883. The purchase by the defendant was in March 1883,—and the sale was confirmed and certificate granted on the 26th July 1883, and the attachment and execution proceedings had not apparently then been commenced.

We find that the property having been attached, the day fixed for sale was 5th March 1884; but, in the meantime, a claim was preferred upon which the property was ultimately released. So far, therefore, as we are aware, the alienation by the original tenant was effected before any execution proceedings were taken by the plaintiff. Had the plaintiff been a sixteen-anna proprietor, there is no doubt that he could, under s. 59 of the then Rent Act, have attached and sold the tenure itself upon the decree obtained against the recorded tenant.

But in the present case it appears to us that his position was different, he being only a fractional co-sharer; and, so far from having any lien upon the land by the Rent Act, he is expressly precluded by s. 64 from proceeding against the tenure, until he has first of all proceeded against all the moveable property of the defaulter. If the plaintiff had no lien upon the tenure in satisfaction of his decree, he cannot succeed in the present suit; and, as I have said, we think that he had no lien either by the decree or by any statute. That being so, we must hold that the decision of the lower Court was correct, and this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*